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4 UNITED STATES DISTRICT COURT
5 EASTERN DISTRICT OF WASHINGTON

6 DEBRA M. MILLER,)
7 Plaintiff,) No. CV-11-38-JPH
8 v.) ORDER GRANTING DEFENDANT'S
9 MICHAEL J. ASTRUE, Commissioner) MOTION FOR SUMMARY JUDGMENT
10 of Social Security,)
11 Defendant.)
12)

13 **BEFORE THE COURT** are cross-motions for summary judgment noted
14 for hearing without argument on June 22, 2012 (ECF Nos. 13, 15).
15 Attorney Maureen J. Rosette represents Plaintiff; Special
16 Assistant United States Attorney Richard M. Rodriguez represents
17 the Commissioner of Social Security (Defendant). The parties have
18 consented to proceed before a magistrate judge, ECF No. 7.
19 Plaintiff filed a reply on December 22, 2011, ECF No. 17. After
20 reviewing the administrative record and the briefs filed by the
21 parties, the court **GRANTS** Defendant's Motion for Summary Judgment,
22 **ECF No. 15.**

23 **JURISDICTION**

24 Plaintiff protectively applied for supplemental security
25 income (SSI) disability benefits on February 16, 2007, alleging
26 disability since January 1, 1962 (Tr. 89-92). [If entitled to
27 benefits, plaintiff would have been eligible as of February 16,
28

1 2007, the application date. SSR No. 83-20.] The application was
2 denied initially and on reconsideration (Tr. 52-55, 57-58).

3 Administrative Law Judge (ALJ) Paul Gaughen held a hearing on
4 November 18, 2008. Plaintiff, represented by counsel, and a
5 vocational expert testified (Tr. 25-46). The ALJ issued an
6 unfavorable decision on January 16, 2009 (Tr. 13-21). On December
7 22, 2010, the Appeals Council denied review (Tr. 1-5), making the
8 ALJ's decision the final decision of the Commissioner, which is
9 appealable to the district court pursuant to 42 U.S.C. § 405(g).
10 Plaintiff filed this action for judicial review on January 27,
11 2011 (ECF Nos. 1, 4).

12 STATEMENT OF FACTS

13 The facts have been presented in the administrative hearing
14 transcripts, the ALJ's decision, and the briefs of the parties.
15 They are briefly summarized here.

16 Ms. Miller was 48 years old when she applied for benefits and
17 49 at the hearing. She was in special education classes through
18 the sixth grade and quit school in twelfth grade. She is married
19 and has four adult children (Tr. 28-31, 167-168). She worked full
20 time seasonally as a meat packer from 1997 through 1999, but lost
21 her job when the company went out of business (Tr. 27, 101, 235).
22 Plaintiff has difficulty with memory, spelling, concentrating and
23 multitasking, but thinking "is okay" (Tr. 30-34). Her disability
24 report states she is unable to work due to epilepsy, memory
25 problems, and "severe learning disabilities" (Tr. 100). She has
26 double vision.

27 Plaintiff testified she had epilepsy but outgrew it at age
28 25. Her abilities in math are limited to addition and subtraction

1 (Tr. 30-32). She performs household chores spread throughout the
2 day, does not drive, and has no license (Tr. 38).

3 She testified she suffers from physical ailments. However,
4 because Plaintiff does not challenge the ALJ's findings as to
5 physical limitations on appeal, ECF No. 14 at 7-12, the Court's
6 review is limited to the ALJ's assessment of psychological
7 limitations.

8 Plaintiff has never received mental health counseling or
9 treatment and does not take psychotropic medication (Tr. 167, 236,
10 244).

11 SEQUENTIAL EVALUATION PROCESS

12 The Social Security Act (the Act) defines disability as the
13 "inability to engage in any substantial gainful activity by reason
14 of any medically determinable physical or mental impairment which
15 can be expected to result in death or which has lasted or can be
16 expected to last for a continuous period of not less than twelve
17 months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also
18 provides that a Plaintiff shall be determined to be under a
19 disability only if any impairments are of such severity that a
20 plaintiff is not only unable to do previous work but cannot,
21 considering plaintiff's age, education and work experiences,
22 engage in any other substantial gainful work which exists in the
23 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). Thus,
24 the definition of disability consists of both medical and
25 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
26 (9th Cir.2001).

27 The Commissioner has established a five-step sequential
28 evaluation process for determining whether a person is disabled.

1 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person
2 is engaged in substantial gainful activities. If so, benefits are
3 denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If not,
4 the decision maker proceeds to step two, which determines whether
5 plaintiff has a medically severe impairment or combination of
6 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

7 If plaintiff does not have a severe impairment or combination
8 of impairments, the disability claim is denied. If the impairment
9 is severe, the evaluation proceeds to the third step, which
10 compares plaintiff's impairment with a number of listed
11 impairments acknowledged by the Commissioner to be so severe as to
12 preclude substantial gainful activity. 20 C.F.R. §§
13 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P
14 App. 1. If the impairment meets or equals one of the listed
15 impairments, plaintiff is conclusively presumed to be disabled. If
16 the impairment is not one conclusively presumed to be disabling,
17 the evaluation proceeds to the fourth step, which determines
18 whether the impairment prevents plaintiff from performing work
19 which was performed in the past. If a plaintiff is able to perform
20 previous work, that Plaintiff is deemed not disabled. 20 C.F.R. §§
21 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step, plaintiff's
22 residual functional capacity (RFC) assessment is considered. If
23 plaintiff cannot perform this work, the fifth and final step in
24 the process determines whether plaintiff is able to perform other
25 work in the national economy in view of plaintiff's residual
26 functional capacity, age, education and past work experience. 20
27 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v. Yuckert*,
28 482 U.S. 137 (1987).

1 The initial burden of proof rests upon plaintiff to establish
2 a *prima facie* case of entitlement to disability benefits.
3 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir.1971); *Meanel v.*
4 *Apfel*, 172 F.3d 1111, 1113 (9th Cir.1999). The initial burden is
5 met once plaintiff establishes that a physical or mental
6 impairment prevents the performance of previous work. The burden
7 then shifts, at step five, to the Commissioner to show that (1)
8 plaintiff can perform other substantial gainful activity and (2) a
9 "significant number of jobs exist in the national economy" which
10 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th
11 Cir.1984).

12 STANDARD OF REVIEW

13 Congress has provided a limited scope of judicial review of a
14 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold
15 the Commissioner's decision, made through an ALJ, when the
16 determination is not based on legal error and is supported by
17 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995 (9th
18 Cir.1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir.1999).
19 "The [Commissioner's] determination that a plaintiff is not
20 disabled will be upheld if the findings of fact are supported by
21 substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th
22 Cir.1983)(citing 42 U.S.C. § 405(g)). Substantial evidence is more
23 than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119
24 n. 10 (9th Cir.1975), but less than a preponderance. *McAllister v.*
25 *Sullivan*, 888 F.2d 599, 601-602 (9th Cir.1989); *Desrosiers v.*
26 *Secretary of Health and Human Services*, 846 F.2d 573, 576 (9th
27 Cir.1988). Substantial evidence "means such evidence as a
28 reasonable mind might accept as adequate to support a conclusion."

1 *Richardson v. Perales*, 402 U.S. 389, 401 (1971)(citations
2 omitted). "[S]uch inferences and conclusions as the [Commissioner]
3 may reasonably draw from the evidence" will also be upheld. *Mark*
4 *v. Celebrezze*, 348 F.2d 289, 293 (9th Cir.1965). On review, the
5 Court considers the record as a whole, not just the evidence
6 supporting the decision of the Commissioner. *Weetman v. Sullivan*,
7 877 F.2d 20, 22 (9th Cir.1989)(quoting *Kornock v. Harris*, 648 F.2d
8 525, 526 (9th Cir.1980)).

9 It is the role of the trier of fact, not this Court, to
10 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
11 evidence supports more than one rational interpretation, the Court
12 may not substitute its judgment for that of the Commissioner.
13 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
14 (9th Cir.1984). Nevertheless, a decision supported by substantial
15 evidence will still be set aside if the proper legal standards
16 were not applied in weighing the evidence and making the decision.
17 *Browner v. Secretary of Health and Human Services*, 839 F.2d 432,
18 433 (9th Cir.1987). Thus, if there is substantial evidence to
19 support the administrative findings, or if there is conflicting
20 evidence that will support a finding of either disability or
21 nondisability, the finding of the Commissioner is conclusive.
22 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.1987).

23 **ALJ'S FINDINGS**

24 At step one, the ALJ found Plaintiff did not earn substantial
25 gainful activity after she applied for benefits (Tr. 15). At step
26 two, he found she suffers from the severe impairments of
27 diverticulitis affecting the sigmoid colon, and history of
28 epilepsy/seizure disorder no longer established or active (in

1 remission for more than 20 years)(Tr. 15). Although the ALJ did
2 not assess any severe mental impairments at step two, his RFC
3 included mental limitations (Tr. 18). At step three, he found that
4 although Plaintiff's impairments are severe, they do not alone or
5 combination meet or medically equal a Listed impairment (Tr. 18).
6 The ALJ found Plaintiff less than completely credible, a finding
7 she does not challenge on appeal (Tr. 18-19). At step four,
8 relying on the VE, he found Plaintiff is able to perform her past
9 work as a meat packer (Tr. 19). Alternatively, at step five, again
10 relying on the VE, the ALJ found Plaintiff can perform other jobs
11 existing in sufficient numbers in the local and national
12 economies, such as housekeeper and cafeteria attendant (Tr. 20).
13 The ALJ found Plaintiff is not disabled as defined by the Social
14 Security Act (Tr. 21).

15 ISSUES

16 Plaintiff alleges the ALJ should have found she suffers from
17 severe mental impairments. And she alleges the ALJ failed to
18 properly credit the opinions of psychologists Ashworth¹, Pollack²,
19 and Bailey³ (ECF No. 14 at 7-12). The Commissioner answers (1) any
20 error at step two is harmless since the ALJ included mental
21 limitations in the RFC; (2) the ALJ included limitations assessed
22 by Ashworth and Bailey in the RFC; (3) he gave clear and

23
24 ¹Clark Ashworth, Ph.D., and Renee Thompson, Psy.D.,
(Ashworth), evaluated Plaintiff on March 28, 2007 (Tr. 167-171).

25
26 ²Dennis Pollack, Ph.D., evaluated Plaintiff on October 24,
27 2008 (Tr. 234-243).

28 ³James Bailey, Ph.D., reviewed the written record for the
SSA on April 5, 2007 (Tr. 180-197).

1 convincing reasons for discounting Pollack's opinion; and (4) the
2 RFC is proper (ECF No. 16 at 6, 9-13).

3 DISCUSSION

4 A. Step two

5 Plaintiff alleges the ALJ erred at step two when he failed to
6 find she suffers from severe mental impairments, ECF No. 14 at 8.

7 Error if any is clearly harmless since the ALJ included
8 mental limitations in the RFC he gave the vocational expert.

9 The ALJ told the vocational expert Plaintiff

10 presents with an ability for understanding, remembering
11 and applying to basic work activities, simple or non-
12 complicated one to three step instructions. She has no
13 major memory deficits and can remember previously acquired
14 details, but she would have significant delays regarding
15 learning and retention of new, detailed material or
16 multitasking at work.

17 (Tr. 42).

18 He continued:

19 Stated another way, she needs relatively simple,
20 repetitive work in order to meet the requirements of doing
21 same for a full work week. The worker needs a structured
22 work environment to complete a work week; has limited
23 capacity, if any, for independent work without the benefit
24 of a supervisor; also would have problems adapting to any
25 frequent, substantial changes in the work setting or work
26 procedures. She can adapt to simple switches or changes.
27 She can do so.

28 Also, due to dysthymia and lack of confidence, the
worker would be unable to do higher level social
interaction. For example, being a project leader or doing
a great deal of collaborative work, but she would not be
limited for perfunctory discourse or social interaction.

(Tr. 42).

With these limitations, the vocational expert, Ms. Lapoint,
opined Plaintiff could perform her past work as a meat packager.
The VE noted it is unskilled, involves math and language at the
minimal (first to third grade) level, is well-learned, simple and

1 repetitive (Tr. 43).

2 The ALJ included mental limitations supported by the record.
3 Because Plaintiff was not prejudiced, she fails to show harmful
4 error at step two. See *Johnson v. Shalala*, 60 F.3d 1428, 1436 n.9
5 (9th Cir.1995)(error is harmless when the correction of the error
6 would not alter the result). An ALJ's decision will not be
7 reversed for harmless errors. *Burch v. Barnhart*, 400 F.3d 676, 679
8 (9th Cir.2005), citing *Curry v. Sullivan*, 925 F.2d 1127, 1131 (9th
9 Cir.1991).

10 Plaintiff fails to meet her burden of showing harmful error.

11 **B. Weighing opinion evidence**

12 Next, Plaintiff alleges the ALJ failed to properly credit the
13 opinions of two examining and one reviewing psychologist (ECF No.
14 14 at 8-13).

15 The Commissioner responds that the ALJ in fact credited
16 Ashworth and Bailey's assessed limitations (ECF No. 16 at 8-9).

17 The Commissioner is correct.

18 In March 2007 Dr. Ashworth opined Plaintiff has no memory
19 deficits, is capable of understanding, remembering and carrying
20 out simple work-related instructions with repetition. She would
21 have difficulty working in a setting without structure, "but would
22 not have trouble interacting with coworkers and supervisors." He
23 assessed a GAF of 50, noting "serious symptoms of borderline
24 intellect" (Tr. 171).

25 In October 2008, Dr. Pollack notes Plaintiff's statement she
26 has no anxiety-related problems, and is unable to work because she
27 dislikes being around a lot of people (Tr. 235-236). He assessed a
28 GAF of 62, indicating only some mild symptoms or functional

1 difficulties. He recommended a full neuropsychological evaluation
2 (Tr. 239). Dr. Pollack opined Plaintiff's ability to complete a
3 normal workday or workweek is moderately limited, and the ability
4 to sustain an ordinary routine without special supervision is
5 markedly limited (Tr. 241).

6 To aid in weighing the conflicting evidence, the ALJ also
7 evaluated Plaintiff's credibility and found her less than credible
8 (Tr. 18-19). Credibility determinations bear on evaluations of
9 medical evidence when an ALJ is presented with conflicting medical
10 opinions or an inconsistency between a claimant's subjective
11 complaints and diagnosed condition. *Webb v. Barnhart*, 433 F.3d
12 683, 688 (9th Cir.2005).

13 As noted the ALJ's credibility determination is unchallenged,
14 making it a verity on appeal.

15 The ALJ incorporated Dr. Ashworth's limitation to simple
16 instructions with repetition, avoiding work requiring higher
17 social functioning, and the need for a structured work environment
18 (Tr. 16-19, 171). Plaintiff points to no evidence showing she
19 suffers greater mental limitations. As the ALJ observed Plaintiff
20 worked in the past. She did not stop due to limitations, but
21 because the business closed (Tr. 19). He notes Plaintiff and her
22 sister both indicated Plaintiff cooks, shops, does household
23 chores, visits with others, plays cards, and reads (Tr. 19). This
24 is evidence Plaintiff is not as limited as alleged.

25 Because the ALJ accepted and incorporated limitations
26 established by the evidence, Plaintiff fails to show any error.

27 The ALJ rejected Dr. Pollack's assessed moderate and marked
28 limitations for clear and convincing reasons. The ALJ is correct

1 that the narrative portion of the report is inconsistent with the
2 assessed limitations (*cf.* GAF indicating some mild symptoms *with*
3 assessed marked limitation). The ALJ is correct that the assessed
4 dire limitations are also inconsistent with the overall record
5 (Tr. 19). Plaintiff has never received mental health counseling of
6 any kind, nor does she take any psychotropic medication,
7 indicating *she* does not consider mental limitations severe.

8 The ALJ did not err when he weighed the evidence.

9 **B. RFC**

10 Finally, Plaintiff asserts the ALJ failed to include all of
11 her limitations in the residual functional capacity assessment
12 (ECF No. 14 at 10-13). Citing *Osenbrock v. Apfel*, 240 F.3d 1157,
13 1165 (9th Cir.2001), the Commissioner accurately responds that this
14 argument simply alleges again that the ALJ improperly weighed the
15 evidence. Since the ALJ's hypothetical included all of Plaintiff's
16 limitations supported by substantial evidence, there was no error
17 (ECF No. 16 at 11-13).

18 A claimant for social security benefits carries the burden of
19 proving she is disabled. 42 U.S.C. § 423(d)(5)(A); *Valentine v.*
20 *Comm'r of Soc. Sec. Admin.*, 574 F.3d 685, 689 (9th Cir.2009).

21 The trier of fact, and not the reviewing court, must resolve
22 conflicts in the evidence and, if the evidence can support either
23 outcome, the court may not substitute its judgment for that of the
24 ALJ. *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir.1992); *Burch*
25 *v. Barnhart*, 400 F.3d 676, 679 (9th Cir.2005).

26 **CONCLUSION**

27 Having reviewed the record and the ALJ's conclusions, this
28 Court finds the ALJ's decision is free of harmful legal error and

1 supported by substantial evidence.

2 **IT IS ORDERED:**

3 1. Defendant's Motion for Summary Judgment, **ECF No. 15**, is
4 **GRANTED.**

5 2. Plaintiff's Motion for Summary Judgment, **ECF No. 13**, is
6 **DENIED.**

7 The District Court Executive is directed to file this Order,
8 provide copies to the parties, enter judgment in favor of
9 Defendant, and **CLOSE** the file.

10 DATED this 5th day of July, 2012.

11 s/ James P. Hutton

12 JAMES P. HUTTON
13 UNITED STATES MAGISTRATE JUDGE
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